BEH THIAN

v.

CITY SPECIALIST CENTRE SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL APPEAL NO: R2-25-117-98]
4 AUGUST 1999

CIVIL PROCEDURE: *Appeal - Refusal to reinstate originating summons for the 2nd time - Non-appearance by counsel for applicant at hearing after 1st reinstatement - Non-appearance attributed to traffic jam on way to court - Whether convincing enough - Whether appeal dismissed*

CIVIL PROCEDURE: *Appeal - Notice of - Not filed within time allowed - No reasons given for delay - Whether affected merits of application*

CIVIL PROCEDURE: *Action - Filing of appeal against striking off of originating summons - Whether action should proceed by way of setting aside instead*

The applicant's originating summons ('OM') was struck off at the Sessions Court upon the absence of applicant's counsel at the hearing. The applicant, intending to file an appeal, did not file the Notice of Appeal within the time allowed. However, the applicant applied for an extension of time. The hearing for the said extension was postponed since the said notice was not served on the respondent. Subsequently, it was postponed again as the respondent wanted to file an affidavit-in-reply. Eventually, it was struck off with costs as counsel for the applicant did not appear at the hearing. The applicant, then applied for the OM to be reinstated and this was granted by the court. At the hearing of the OM after reinstatement, counsel for the applicant failed to appear in court. No reasons were given for his absence. Thus, the court ordered the OM to be struck off. The applicant then applied for the OM to be reinstated for a second time. However, this time it was dismissed. Hence, the instant appeal. The reasons given by counsel for the applicant for his earlier absence was that he was late due to traffic jam on his way to court. On the other hand, the respondent alleged that the action taken by the applicant to file an appeal against the order of striking off of the OM was not proper. The proper action was an application to set aside the said order with a view of having the OM reinstated.

Held:

[1] This was the second time counsel for the applicant failed to appear in court despite having made an assurance at the earlier hearing that he would not be absent again. Further, the ground given by him for being absent due to traffic jam was not convincing. Counsels have been repeatedly warned that in Kuala Lumpur traffic jam is an everyday occurrence and as such should not be used as a ground for failing to appear in court when their cases are called up for hearing. Despite this, the applicant still made use of the traffic jam issue as a ground for not appearing in court when the case was called up.

[2] The proper action that should have been taken by the applicant was not to file an appeal against the order of striking off by the Sessions judge but more appropriately to make an application to set aside the order of striking off with a view to have it reinstated.

[3] The applicant also failed to give convincing reasons for the delay in filing the notice of appeal. As such, this affected the merits of such application.

[Application dismissed with costs.]

For the applicant - Robert Low (Vinod Kamalanathan with him); M/s Cheang & Ariff
For the respondents - Manmohan Singh Dhillon; M/s PS Ranjan & Co

Reported by Usha Thiagarajah

JUDGMENT

Azmel Maamor J:

This is an appeal by the applicant against my decision refusing to reinstate the applicant's usul pemula dated 20 October 1998 which had been earlier struck off on the ground of the failure of the applicant's counsel to appear at the date fixed for hearing of the matter, on 21 April 1999.

In order to give a better understanding of this case I think it is pertinent for me to relate the background that led to the applicant filing this originating motion. At the sessions court below on the date fixed for hearing of the claims by the plaintiff/applicant against the defendants/respondents, which was fixed for hearing on 29 September 1998, the plaintiff's counsel applied for a postponement as his witnesses were not available in court. That application for postponement was not granted by the learned sessions court judge. Because the plaintiff's counsel was not prepared to go on for hearing on that day the sessions court judge ordered that the plaintiff's claims be struck off.

As a result of that order made by the sessions court judge the plaintiff intended to lodge an appeal. But no notice of appeal had been filed within the time allowed. Hence an application by way of Notis Usul Pemula was filed on 20 October 1998, by the plaintiff/applicant applying for extention of time to file the notice of appeal. In his supporting affidavit the applicant gave a lame excuse as to why the notice of appeal was not filed within the time prescribed by law. Paragraph 15 of the said affidavit merely said as follows:

> 15. Saya dengan segala hormatnya menyatakan kelewatan dalam memfailkan dan menyerahkan Notis Rayuan adalah **tidak sengaja** dan/atau tidak bertujuan untuk menghina Mahkamah Yang Mulia ini dan saya memohon maaf atas sebarang kesulitan yang tertimbul." (emphasis added).

In para 16, however, the applicant stated that he believed that the respondent's counsel had no objection to the notice of appeal. However, in their affidavit in reply the respondent denied that they had instructed their counsel not to have any objection to this application. What the respondent said in their affidavit in reply was that their counsel would have no objection to the notice of appeal if it was made within the time allowed by law.

It was also pointed out by the respondent that the proper action that should have been taken by the applicant/plaintiff would be to make an application to set aside the order of striking out with a view to have it reinstated instead of filing a notice of appeal.

The hearing of the application for extension of time to file the notice of appeal was fixed on 26 November 1998. It had to be postponed to another date since the notice had not been served on the respondent. When the case was heard again on 15 December 1998 the respondent's counsel applied for a postponement on the ground that the respondent wanted to file an affidavit in reply. It was then fixed for hearing on 4 January 1999.

On this day (4 January 1999) the counsel for the applicant did not appear in court, even though counsel for the respondent was present. No reason was given for the applicant's counsel's absence. As such I ordered the application be struck off with costs.

On 6 January 1999 the applicant filed an application for the notis usul pemula be reinstated. In the affidavit in support of the application, the counsel for the applicant said that the date of hearing (4 January 1999) had not been entered in the firm's diary by the clerk in charge. This application was fixed for hearing on 9 March 1999. After having heard arguments from counsels of both parties I granted the application to reinstate the originating motion.

The hearing of the usul pemula was fixed on 21 April 1999. Again the counsel for the applicant failed to appear in court even though the counsel for the respondent was present. Again no reason was given to the court for his absence. As such I ordered the usul pemula be struck off. Again a second application to reinstate it was filed on 22 April 1999 and the hearing of it was fixed on 10 May 1999. In the supporting affidavit of the counsel for the applicant the reason given for failing to appear on 9 March 1999 was that he was late in arriving at Wisma Denmark because there was traffic jam during the journey from his home to the court.

At the hearing the counsel for the respondent opposed to the application, on the ground that this is the second time the counsel failed to appear in court. Furthermore the reason given cannot be acceptable.

After having considered the matter carefully I decided to dismiss the application to reinstate. In arriving at this decision I look into consideration that this is the second time that the counsel for the applicant failed to appear in court, despite having made an assurance at the earlier hearing that he would not be absent again. It would appear the counsel does not give much value to the court's kindness in granting the first application. Furthermore the ground given by him for being absent due to traffic jam was not convincing. I have repeatedly warned counsels and had issued statement to the Bar Council that in Kuala Lumpur traffic jam is an everyday occurrence. Hence that should not be used as a ground for failing to appear in court when their cases are called up for hearing. Despite these repeated warnings the applicant still made use of the traffic jam as a ground for not appearing in court when the case was called up. As such I could not accept that ground to be reasonable.

In addition to the above reasons I have also taken into consideration the views expressed by the counsel for the respondent in that the proper action that should have been taken by the applicant/plaintiff would have been not to file an appeal against the order of striking out by the sessions court judge but more appropriately to make an application to set aside the order of striking off with a view to have the plaintiff's' action reinstated. Furthermore, the application had failed to give convincing reason for the delay in filing the notice of appeal. As such this affects the merits of such application.

In the circumstances and for the reasons as mentioned above I dismissed the application with costs.